

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

\* \* \* \* \*

HEALTHY SOLUTIONS, LLC,  
et al

Plaintiffs,

vs.

ITV DIRECT, INC.  
et al

Defendants.

\* \* \* \* \*

CIVIL ACTION  
No. 04-10421-JLT

BEFORE THE HONORABLE JOSEPH L. TAURO  
UNITED STATES DISTRICT JUDGE  
STATUS CONFERENCE

A P P E A R A N C E S

SEYFARTH SHAW LLP  
World Trade Center East  
Two Seaport Lane, Suite 300  
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for the plaintiff ITV Direct  
By: Christopher F. Robertson, Esq.

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By: Becky V. Christensen, Esq.

Courtroom No. 20  
John J. Moakley Courthouse  
1 Courthouse Way  
Boston, Massachusetts 02210  
February 1, 2005  
10:45 a.m.

APPEARANCES, CONTINUED

GADSBY & HANNAH LLP  
225 Franklin Street  
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for the plaintiff in intervention Cappseals  
By: Daniel J. Kelly, Esq.  
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P R O C E E D I N G S

**THE COURT:** Have you worked out your dispute with respect to Judge O'Toole's order?

**MR. KELLY:** We have not, Your Honor. My name is Dan Kelly. I'm for the plaintiff --

**THE COURT:** Do you want to call it?

**THE CLERK:** I am going to call the case, Judge.

Civil action No. 04-10421, Healthy Solutions versus ITV Direct. Would counsel please identify themselves for the record.

**MR. KELLY:** My name is Dan Kelly, with Scott Silverman, from Gadsby. We represent Cappseals, the plaintiff in intervention.

**MS. CHRISTENSEN:** Good morning, Your Honor. I am Becky Christensen. I represent Healthy Solutions, LLC, Health Solutions, Inc., Alex Guerrero, Mike Howell and Greg Geremesz, all defendants in the counterclaim.

**THE COURT:** Okay.

**MR. ROBERTSON:** And Christopher Robertson, Seyfarth Shaw, for the plaintiff ITV Direct.

**THE COURT:** Okay. Now, how critical is this report? I mean, one path I can suggest is that we permit you to file a motion with Judge O'Toole and ask whether he will permit the distribution of the results of his order to

1 the parties in this case.

2 **MR. KELLY:** Well, let me explain why the  
3 report is critical. There were initially --

4 **THE COURT:** No, how about that? I mean, I  
5 will take your word for it.

6 **MR. KELLY:** Judge, I have already talked to  
7 the lawyer who represents the FTC, the lead attorney, a  
8 Mr. Daniel Kaufman. I spoke to him yesterday. He said that  
9 he had no objection to the release of the report and any of  
10 the documents that have been produced by ITV in that matter.

11 **THE COURT:** No, but the order is Judge  
12 O'Toole's.

13 **MR. KELLY:** That's correct, Judge.

14 **THE COURT:** So all you have to do is just file  
15 a motion with Judge O'Toole, saying all that and ask him to  
16 just issue an order releasing the confidentiality of the --  
17 relieving everybody from the confidentiality of his order.  
18 And then I will allow the motion to produce.

19 **MR. KELLY:** We could go that route, Judge.  
20 I'm not sure whether it's necessary. I am concerned about  
21 the delay associated with filing such --

22 **THE COURT:** You could do it this afternoon. I  
23 mean, he is right here in the building.

24 I think it is presumptuous of me to issue an order  
25 that may be deemed to contradict what he said.

1                   **MR. KELLY:** I understand that, Judge. But the  
2 Court is certainly within its rights to address the  
3 supplementation of the initial disclosures, because it's not  
4 just the report that we're requesting. We have not seen any  
5 of the additional documents from the -- from ITV since the  
6 initial disclosures back in February.

7                   This case in large respects concern what they have  
8 done with respect to the sale of these products that  
9 originated with our client and any expenses or costs that  
10 they incurred with respect to the sale of those products.

11                   **THE COURT:** That is a different issue; isn't  
12 it?

13                   **MR. KELLY:** It is a different issue but it is  
14 included within our motion, Judge.

15                   **THE COURT:** Well, it may be but I am parsing  
16 it up. I am saying I am not going to do anything with  
17 respect to Judge O'Toole's order. I will let you try to  
18 have him release the confidentiality of it.

19                   That may be an overabundance of caution on my part.  
20 But, anyway, that is the way it is.

21                   As far as bringing up-to-date what is Rule 26  
22 material, you have an obligation to bring that up-to-date.

23                   **MR. ROBERTSON:** And we agree, Your Honor.  
24 What we have not agreed to produce are -- as part of the  
25 FTC, our clients have been required to prepare asset

1 disclosures and asset statements which have nothing to do  
2 with the liability or the merits claimed in this case. They  
3 have to do with potential recovery once they get a judgment.

4 And as we have cited in our briefing, asset  
5 disclosures, you know, is for after they get that judgment,  
6 not now. These are truly just asset documents. In their  
7 motion they don't hide the fact that that's what they are  
8 looking for. They are simply looking for documents that  
9 reflect where our assets are.

10 **THE COURT:** Doesn't that go towards damages?

11 **MR. ROBERTSON:** No, it doesn't --

12 **THE COURT:** Their assets -- excuse me.

13 **MR. ROBERTSON:** I'm sorry.

14 **THE COURT:** Their assets are probably affected  
15 by the profit picture.

16 **MR. ROBERTSON:** Well, no, it doesn't go to  
17 their claim. Their claim is that they shipped a certain  
18 amount of product to us. What happened to it afterwards is  
19 irrelevant on that issue.

20 Whether we have --

21 **MR. KELLY:** That is in regard to their claims,  
22 Judge. They're claiming a host of setoff defenses based  
23 upon all of these costs that they incurred, a fraudulent  
24 misrepresentation by the party in the middle of this Healthy  
25 Solutions. They're claiming that they don't have to pay us

1 anything because they've incurred all these damages and  
2 costs associated with producing this product. And that's  
3 one of the things that is in our motion.

4 They have never articulated exactly what their  
5 damages are as they're required to do in the initial  
6 disclosures, nor have they given us any documents which  
7 support their claim for damages. That's why it's relevant.

8 (Pause in proceedings.)

9 **THE COURT:** I think what he says is correct.  
10 I think that you do have an obligation under Rule 26, if you  
11 have got a counterclaim of some sort, to set forth the basis  
12 for your assertion of financial loss.

13 **MS. CHRISTENSEN:** I don't disagree with that,  
14 Your Honor, at all. What we produced is we produced all the  
15 invoices, all those documents. We can certainly go back  
16 through what we produced and see if there are other  
17 documents.

18 What we have not agreed to produce are financial  
19 statements, individual and company financial statements that  
20 were prepared specifically for the Federal Trade Commission  
21 in connection with attempting to resolve that case with  
22 them.

23 **THE COURT:** All right. So what is wrong with  
24 that?

25 **MR. KELLY:** It's just not true, Judge. They

1 haven't produced any documents. I think my colleague will  
2 back me up. They only produced the bare minimum of  
3 documents associated with the sale by Healthy Solutions of  
4 these products that we manufacture.

5 **THE COURT:** Why don't I do this, why don't I  
6 let you take a deposition of them with the authority to  
7 summons in whatever, a 30(b)(6).

8 **MR. KELLY:** A custodian of record deposition?

9 **THE COURT:** Yes. Bring it all in. And have  
10 somebody there that understands the numbers and get it that  
11 way if they don't want to give it to you the easy way.

12 **MR. ROBERTSON:** And certainly if they get an  
13 order from O'Toole releasing the report, we will give them  
14 the report, which has all the data. I mean, I can tell you,  
15 I can tell them, I will tell you --

16 **THE COURT:** Do you want to settle this?

17 **MR. ROBERTSON:** Well, we'll talk about that in  
18 a minute. We have had those discussions, Your Honor.

19 **THE COURT:** Why don't we talk about now.

20 **MR. ROBERTSON:** Sure.

21 **MS. CHRISTENSEN:** I've been the quiet one,  
22 Your Honor, for a reason, which is we've had some very --

23 **THE COURT:** You are holding the money.

24 (Laughter.)

25 **MS. CHRISTENSEN:** Well, I wish we were. We



1 had some very productive settlement discussions just this  
2 morning. And we have agreements in principle but we could  
3 use the Court's assistance in making sure that we do this  
4 properly.

5 Here's the overall framework.

6 Mr. Robertson's client had received over 300,000  
7 bottles of goods. Those were sold to Mr. Robertson's client  
8 by my clients.

9 Mr. Kelly represents the company that actually made  
10 this product and shipped it. My client and Mr. Kelly's  
11 clients have not been paid. Our claim is 1.8 million  
12 without interest. Theirs is \$890,000 plus, without interest  
13 or cost for fees and so forth.

14 My clients would like to move on with their lives  
15 and get out of the litigation. And so in principle we have  
16 agreed to allow the product supplier to enter judgment  
17 against us.

18 And then we have agreed in principle with  
19 Mr. Robertson who represents ITV Direct and Direct  
20 Fulfillment that we will release each other except to the  
21 extent that Healthy Solutions owes money to the supplier  
22 manufacturer of the goods.

23 **THE COURT:** Who is?

24 **MR. KELLY:** My client, Judge, Cappseals.

25 **MS. CHRISTENSEN:** Now, you say --

1                   **THE COURT:** You mean to the extent he owes  
2 money to you?

3                   **MS. CHRISTENSEN:** No. To the extent that he  
4 owes my client and carving out what we owe to Mr. Kelly's  
5 client who is the supplier, the manufacturer of this  
6 product.

7                   Where we need the Court's assistance is if the  
8 Court --

9                   **THE COURT:** You have got a million eight  
10 coming to you but you have got to pay for the foods.

11                   **MS. CHRISTENSEN:** Correct.

12                   **THE COURT:** Which is eight hundred thousand.

13                   **MR. KELLY:** Nine hundred thousand plus  
14 interest.

15                   **THE COURT:** Nine hundred thousand. So that  
16 leaves nine hundred thousand. And you are saying that that  
17 would end the case except that his client is owed some money  
18 by your client?

19                   **MR. ROBERTSON:** Actually, Your Honor, the way  
20 this works is that there is a claim by Cappseals against  
21 Healthy Solutions and a claim by Healthy Solutions against  
22 us. We have counterclaims against Healthy Solutions.

23                   We are willing to resolve our issues with Healthy  
24 Solutions only to the extent that we would essentially each  
25 step in the shoes of the other. And they would still have

1 their claims against us but we would also retain our  
2 affirmative defenses and rights of setoff. Basically that  
3 we would be able to make those defenses at any trial in this  
4 action --

5 **THE COURT:** You are just paring it down.

6 **MR. ROBERTSON:** Paring it down, yes.

7 **THE COURT:** That doesn't excite me, so I will  
8 stick with you. You just lost my interest.

9 Why can't you settle the whole thing?

10 **MR. ROBERTSON:** Because we are still actively  
11 engaged in litigation with the Federal Trade Commission who  
12 in their view has determined that all of this money we are  
13 fighting about is likely to go back to them. So we can't --

14 **THE COURT:** Well, that is a different case.  
15 Why doesn't that just go before --

16 **MR. ROBERTSON:** Because we have an  
17 indemnification agreement with her client that they're  
18 liable for any amounts that we ultimately have to pay. And  
19 so --

20 **MS. CHRISTENSEN:** Your Honor, we don't agree  
21 with that at all but we're willing to let it all go so that  
22 my clients can move on with their lives and do business.

23 We have an indemnity action against his clients in  
24 Judge O'Toole's court which is in the FTC action.

25 But the barrier for my client in settling simply

1 has to do with the existence of the court's injunction. And  
2 we want to be careful, and the three sets of attorneys are  
3 in agreement, that Cappseals' rights to bring its claims and  
4 ITV Direct's rights would not be impaired by letting us out.  
5 And that's where we need the Court's assistance, that we  
6 don't run afoul of the injunction that says that we can't  
7 compromise the only asset that we have, which is the  
8 receivable for over 1.8 million.

9 **THE COURT:** Well, as long as everybody agrees  
10 to it, I mean, I am not going to stand in your way.

11 What you have to do is to come up with an agreement  
12 for judgment that sets all of this down in some  
13 understandable way. And if you are looking for approval  
14 from me, I will approve it as long as everybody else is  
15 agreed to it.

16 **MR. KELLY:** We just don't want to interfere,  
17 Judge, with our continued prosecution of these claims. We'd  
18 like to get this discovery as you suggested completed as  
19 soon as possible and a trial date so that we can go forward  
20 on this.

21 **THE COURT:** Well, we can do that too. So  
22 there are two distinct features here.

23 One is some agreement you are going to enter into  
24 that pares down the issues.

25 And the second, the continuation of the discovery

1 in what will be the remaining case regardless of what  
2 happens in this settlement agreement. And that requires you  
3 going to Judge O'Toole for permission to get the  
4 confidential order that results from his order, confidential  
5 material that results from his order and the deposition of  
6 the -- what is the name of your company again?

7 **MR. ROBERTSON:** ITV. I would actually -- I'm  
8 sorry, Your Honor.

9 **THE COURT:** Go ahead.

10 **MR. ROBERTSON:** I was just going to propose if  
11 they want to submit written interrogatories to us, we can do  
12 it that way.

13 **THE COURT:** Well, I think depositions are  
14 faster.

15 **MR. ROBERTSON:** Okay. I would also just  
16 propose -- I think all the information they want is sitting  
17 in that report. And, again, O'Toole's finding --

18 **THE COURT:** Well, if he gets -- maybe that is  
19 the thing to do.

20 **MR. ROBERTSON:** Maybe just wait --

21 **THE COURT:** Just go to Judge O'Toole first.  
22 He will give you the order. They get the report and then  
23 see if you need anything else. Maybe they don't.

24 **MR. ROBERTSON:** If you want a deposition with  
25 the report --

1                   **MR. KELLY:** Well, remember, we are talking  
2 about not only what's in the report but we are talking about  
3 their damages here. We're required under the initial  
4 disclosures --

5                   **THE COURT:** You may look at the report and say  
6 I don't need anything else. You may look at the report and  
7 say I still need to take the deposition, which I am giving  
8 you permission to do.

9                   **MR. KELLY:** Could we set a date for that,  
10 Judge?

11                  **THE COURT:** Yes. First of all, how much time  
12 do you need to make the request to go to Judge O'Toole?

13                  **MR. KELLY:** I assume we can do that within the  
14 next two days.

15                  **THE COURT:** All right. So let's say you will  
16 do that within the next 48 hours.

17                         We can't say when he will respond.

18                  **MR. KELLY:** May I ask some clarification? Is  
19 it permissible, Judge, to represent to Judge O'Toole that  
20 you would be willing to issue an order requiring the  
21 production of the report, assuming we work out the issues  
22 concerning confidentiality?

23                  **THE COURT:** As long as he agrees.

24                  **MR. KELLY:** Right.

25                  **THE COURT:** All you have to do is just spend a

1 little money and Carol can type it up, this last portion,  
2 and you can attach that to your motion.

3 **MR. KELLY:** Right. Just so I'm clear, the  
4 Court's view is that the report is relevant. It's  
5 permissible for us to --

6 **THE COURT:** It might well be relevant. I  
7 don't even know what it says. But it is nothing as far as I  
8 am concerned. It is up to Judge O'Toole. If he says they  
9 can get it, it is fine by me. They can look at it. And  
10 then you determine what relevance it has. I am not going to  
11 determine relevance in advance.

12 Then, in addition to that, so you are going to  
13 accomplish that in two days. We will see when Judge O'Toole  
14 gets back to you.

15 You then want to take this deposition. When do you  
16 want to take it?

17 **MR. KELLY:** Well, let me say, Judge, the  
18 report is fine but we would like to have all of the  
19 underlying data supporting the report.

20 **THE COURT:** Just --

21 **MR. KELLY:** And there is no reason why they  
22 can't produce that independent of our review of the report.

23 In other words, this report is based upon --

24 **THE COURT:** Do you want to take your chances  
25 on that? I am giving you a chance to summons it in and sit

1 there in the same office and have it handed to you.

2 When do you want to? So that is the course we will  
3 follow. If you do it voluntarily, then you don't need the  
4 deposition.

5 When do you want to have the material available for  
6 your deposition?

7 MR. KELLY: As soon as possible, Judge.

8 THE COURT: That doesn't help out.

9 MR. KELLY: Two weeks.

10 THE COURT: All right, two weeks.

11 MR. KELLY: And that deposition would not only  
12 cover the material underlying their damages claim but it  
13 would also require them to articulate what their damages  
14 claim is pursuant to the initial disclosure rule.

15 THE COURT: Rule 26, right.

16 MR. KELLY: Right.

17 THE COURT: They have to meet the requirements  
18 of Rule 26. Okay. My Rule 26 order. Okay.

19 All right. So we will issue an order memorializing  
20 all this. And then we will bring you back, let's say sixty  
21 days from now, around then, to see what you have done to  
22 each other and give you a trial date.

23 MR. KELLY: Judge, I would just as soon  
24 schedule, could we have a final pretrial conference on that  
25 date so that we don't --



1                   **THE COURT:** Yes, that is what I am doing.

2                   **MR. KELLY:** In other words, required within  
3 the Court's rules, all of the things that are required  
4 before the submission, before the attendance of the final  
5 pretrial conference on that date. In other words, the  
6 identification of exhibits, of witnesses, I just want to get  
7 to the end game.

8                   **THE COURT:** Yes, we can do that. She will  
9 send out an order requiring the names of the witnesses and  
10 how much time each one will take.

11                   **MR. KELLY:** Marking of exhibits.

12                   **THE COURT:** Okay.

13                   **THE CLERK:** April 5th for the pretrial.

14                   **MS. CHRISTENSEN:** I'm sorry?

15                   **THE CLERK:** April 5th, eleven o'clock.

16                   **MR. ROBERTSON:** In the interim, Your Honor, we  
17 will see if we can work out a document that articulates  
18 where we are.

19                   **THE COURT:** Okay.

20                   **MR. KELLY:** Judge, should we wait until you --  
21 you just mentioned you are going to put together an order.  
22 Should we wait until we receive that before we go to Judge  
23 O'Toole?

24                   **THE COURT:** You can do that. They are pretty  
25 good. They will have it out today.

1                   **MR. KELLY:** Okay. So once we receive that, we  
2 will move within 48 hours.

3                   **THE COURT:** Okay. Anything else?  
4 All right. Thank you.

5                   **MR. KELLY:** Thank you, Your Honor.

6                   **MS. CHRISTENSEN:** Thank you, Your Honor.

7                   **MR. ROBERTSON:** Thank you, Your Honor.

8                   (WHEREUPON, the proceedings were recessed at 11:05  
9 a.m.)

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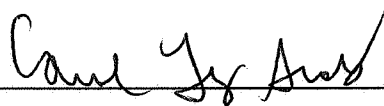
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## C E R T I F I C A T E

I, Carol Lynn Scott, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.



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